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No. ———

In The

Supreme Court of the United States

October Term, 1985

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RALPH KEMP, WARDEN,
Petitioner,

v.

WAYNE CARL COLEMAN,
CARL J. ISAACS, AND
GEORGE ELDER DUNGEE,
Respondents.

———o———

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

———o———

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QUESTIONS PRESENTED

1.

Is the presumed prejudice standard of *Rideau v. Louisiana*, 373 U.S. 726 (1963) still valid in light of the presumption of correctness set forth in 28 U.S.C. § 2254(d) and the special deference due state court findings of juror impartiality?

2.

Assuming the continued viability of the presumed prejudice principle, what constitutes the "totality of the circumstances" to be reviewed in a presumed prejudice analysis?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered in the cases involving Respondents on December 9, 1985 and January 31, 1986.

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit involving these Respondents are reported in *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985); and *Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985). (*See* Appendices, Vol. I, Document No. 5 and Vol. II, Docu-

ment No. 5). The decisions of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's petition for rehearing and suggestion for rehearing *en banc* were entered on January 31, 1986. (*See* Appendices, Vols. I, Document No. 6 and Vol. II, Document No. 5). The opinions of the district court denying federal habeas corpus relief to the Respondents on remand were entered on March 18, 1985. (*See* Appendices, Vol. I, Document No. 4 and Vol. II, Document No. 4).

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JURISDICTIONAL STATEMENT

The opinions of the United States Court of Appeals for the Eleventh Circuit involving these Respondents were entered on December 9, 1985 and January 31, 1986.

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

(i) Course of the Proceedings.

Respondents Wayne Carl Coleman, Carl J. Isaacs and George Elder Dungee were originally indicted on September 4, 1973 by the Seminole County, Georgia, Grand Jury on six counts of murder. All three of the Respondents, along with co-indictee, Billy Isaacs, were accused of the malice murder of six members of the Alday family: Ned Alday, Jerry Nelson Alday, Jimmy Cecil Alday, Aubrey Alday, Jester Addis Alday and Mary Campbell Alday.

Respondents filed a joint motion for a change of venue which was overruled by the trial court on October 9, 1973. Each of the Respondents was tried separately from his co-defendants and following their individual jury trials, they were each convicted on all six counts of murder on January 17, January 3 and January 9, 1974, respectively. As to each of the Respondents the jury recommended death sentences, finding statutory aggravating circumstances on each of the six counts of murder. These death sentences were imposed by the trial court.

(ii) Direct Appeals.

The Supreme Court of Georgia affirmed Respondent Coleman's convictions and sentences and, thereafter, his petition for a writ of certiorari was denied by this Court. *Coleman v. State,* 237 Ga. 84, 226 S.E.2d 91 (1976), *cert. denied,* 431 U.S. 909 (1977), *rhng. denied,* 431 U.S. 961 (1977).

Respondent Isaacs' convictions and sentences were affirmed by the Supreme Court of Georgia in *Isaacs v. State,* 237 Ga. 105, 226 S.E.2d 922 (1976). Respondent

Isaacs' petition for a writ of certiorari was denied by this Court in *Isaacs v. Georgia,* 429 U.S. 986 (1976).

Respondent Dungee pursued a separate direct appeal to the Supreme Court of Georgia, which court affirmed Respondent's convictions and sentences in *Dungee v. State,* 237 Ga. 218, 227 S.E.2d 746 (1976). Respondent Dungee filed a separate petition for a writ of certiorari in this Court which was denied in *Dungee v. Georgia,* 429 U.S. 986 (1976).

(iii) Collateral Proceedings Involving Wayne Carl Coleman

Respondent Coleman filed a state habeas corpus petition in the Superior Court of Tattnall County, Georgia and evidentiary hearings were conducted in that court on July 27, 1979 and on January 25, 1980. The state habeas corpus court entered an order on June 14, 1980 denying Respondent Coleman's petition for state habeas corpus relief. An application for a certificate of probable cause to appeal filed by Respondent Coleman in the Supreme Court of Georgia was denied on October 31, 1980. Respondent Coleman's second petition for a writ of certiorari filed in this Court was denied in *Coleman v. Balkcom,* 451 U.S. 949, *rhng. denied,* 452 U.S. 955 (1981).

On July 8, 1981, Respondent Coleman filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, Thomasville Division. (R. 11-44). Following the submission of the petition and briefs by both parties, the district court denied federal habeas corpus relief in an order dated March 11, 1982 and entered judgment for the Petitioner. Respond-

ent Coleman's motion to reopen judgment was denied on April 26, 1982. Respondent Coleman filed an application for a certificate of probable cause to appeal and a notice of appeal. (R. 340-341; 348). The certificate of probable cause to appeal was granted by the district judge on June 29, 1982. (R. 350).

Briefs were filed on behalf of all parties in the United States Court of Appeals for the Eleventh Circuit and oral argument was conducted. On June 10, 1983, the Eleventh Circuit entered an order remanding this action to the district court for an evidentiary hearing on the issue of whether a change of venue should have been granted based on alleged prejudicial pre-trial publicity and permitting the presentation of evidence on the issues of whether Respondent Coleman was denied effective assistance of counsel and whether the participation of the special prosecutor in Respondent's trial deprived Respondent of his constitutional rights.

Following the remand to the district court, extensive discovery was undertaken in order to comply with the Eleventh Circuit's remand order and evidentiary hearings were conducted on August 7, 1984 and on November 5, 6, 7, and 8, 1984. (*See* Supplemental Record on Appeal). Counsel for Petitioner and Respondent Coleman filed proposed findings of fact and conclusions of law. On March 18, 1985, the district court entered its "Findings of Fact and Conclusions of Law Pursuant to Remand." (S.R. 60-90).

(iv) Collateral Proceedings Involving Carl J. Isaacs

Following an evidentiary hearing, state habeas corpus relief was denied to Respondent Isaacs on August 31, 1977 in a consolidated action involving co-defendant George Dungee. The Supreme Court of Georgia affirmed the judgment of the state habeas corpus court denying relief to Respondents Isaacs and George Dungee in *Dungee et al. v. Hopper,* 241 Ga. 236, 244 S.E.2d 849 (1978). A joint petition for a writ of certiorari filed in this Court was denied on November 2, 1978.

The district court denied Respondent Isaacs federal habeas corpus relief on October 22, 1981. Following the filing of briefs and after oral argument in the Eleventh Circuit, the case was remanded to the district court on a limited remand to consider any additional evidence on the issue of alleged prejudicial pretrial publicity, in an order dated June 21, 1983. On March 18, 1985, the district court entered its "Findings of Fact and Conclusions of Law Pursuant to Remand," denying Respondent Isaacs federal habeas corpus relief.

(v) Collateral Proceedings Involving George Elder Dungee

Respondent Dungee was denied state habeas corpus relief by order of the Superior Court of Tattnall County, Georgia, on August 31, 1977, Respondent Dungee having filed a consolidated state habeas corpus action with co-

defendant Carl J. Isaacs. Respondents Dungee and Isaacs filed a consolidated appeal to the Supreme Court of Georgia, which court affirmed the judgment of the state habeas corpus court denying relief to Respondent Dungee in *Dungee et al. v. Hopper,* 241 Ga. 236, 244 S.E.2d 849 (1978). A joint petition for a writ of certiorari was filed in this Court and was denied on November 2, 1978.

Respondent Dungee was denied federal habeas corpus relief by the United States District Court for the Middle District of Georgia, Thomasville Division in an order dated October 22, 1981. Following the filing of briefs and the conducting of oral argument in the Eleventh Circuit Court of Appeals, this action was remanded to the district court on a limited remand to consider any additional evidence on the issue of alleged prejudicial pre-trial publicity in an order dated June 21, 1983. On March 18, 1985, the district court entered its "Findings of Fact and Conclusions of Law Pursuant to Remand" and denied Respondent federal habeas corpus relief. The district court also denied Respondent Dungee's motion for leave to amend his application for federal habeas corpus relief on February 11, 1986.

(vi) Final Orders of the Eleventh Circuit Involving All Three Respondents

On appeal by Respondents to the Eleventh Circuit, a panel of that Court, in an order dated December 9, 1985, granted Respondents federal habeas corpus relief, finding

that Respondents had demonstrated that they had not received a fair trial before an impartial jury. *Coleman v. Kemp,* 778 F.2d 1487 (11th Cir. 1985) and *Isaacs v. Kemp,* 778 F.2d 1482 (11th Cir. 1985). (*See* Appendices, Vol. I., Document No. 5 and Vol. II, Document No. 5).

Petitions for rehearing filed by Petitioner Kemp in all three cases were denied on January 31, 1986. (*See* Appendices, Vol. I, Document No. 5 and Volume II, Document No. 5).

(vii) Statement of the Facts.

As already noted, Respondents Wayne Carl Coleman, Carl J. Isaacs, and George Elder Dungee were indicted for the execution style murders of six members of the Alday family in Seminole County, Georgia. Each Respondent was tried separately from his co-defendants and a detailed statement of the facts at trial is set out in the opinion of the Supreme Court of Georgia in the case of Respondent Coleman. *Coleman v. State,* 237 Ga. 84, 226 S.E.2d 91 (1976), *cert. denied,* 431 U.S. 909, *rhng. denied,* 431 U.S. 961 (1977).

The evidence produced at the three trials was substantially the same and showed that in the early part of May, 1973, Respondent Carl Isaacs was successful in locating his brother, Billy Isaacs, in Baltimore, Maryland, after

Carl Isaacs had escaped from a correctional institution. (T. 800, 838). Accompanying Carl Isaacs was Wayne Carl Coleman, (who was Billy Isaacs' half-brother) and George Elder Dungee. (T. 800, 838). According to Billy Isaacs, who testified at all three of his co-indictee's trials, the four men met in Baltimore, Maryland, and although they did not have an automobile when they met, by the following day they had "taken possession" of one. (T. 839, 841). Then, the four men began the trip which culminated in the murders of the six members of the Alday family in Seminole County, Georgia.

The four men left Maryland, traveled to Pennsylvania, returned to Maryland, then traveled through West Virginia, Virginia, North Carolina, South Carolina, Georgia and Florida. Upon returning to Georgia from Florida, they entered Seminole County and eventually stopped at the Alday trailer home. (T. 502-503, 800-801, 847). The men stopped at the Alday home for the purpose of stealing another car and obtaining money, food and gasoline. (T. 919). Upon arriving at the Alday home at approximately 4:00 to 4:30 p.m. on May 14, 1973, Carl Isaacs knocked on the door and when no one answered, he and Coleman broke into the trailer. (T. 801-802, 848). Within three or four minutes, Coleman came to the door and motioned for Billy Isaacs to approach the trailer. Then, Coleman handed Billy Isaacs a camera and a piggy bank containing money, to be placed in the car. (T. 802).

As Billy Isaacs returned to the car with the stolen items, he saw Ned Alday and Jerry Alday approaching the trailer home in a jeep. (T. 802). When Jerry and Ned Alday arrived they were taken at gunpoint into the trailer and forced to sit on the kitchen floor while the trail-

er was searched for guns and money. (T. 802-804, 920). Shortly thereafter, Carl Isaacs took Jerry Alday into the south bedroom of the trailer, while Coleman took Ned Alday into the north bedroom of the trailer. (T. 804). Numerous gunshots were heard from each bedroom. (T. 804). Ned Alday was discovered in the north bedroom of the trailer with five bullet wounds to the right side of his face and two bullet wounds to the side and back of his head. (T. 515, 564). All five bullet wounds to the side of the face penetrated the brain and were the cause of death. (T. 564). The wounds were the result of bullets fired from both .22 caliber and .32 caliber pistols. (T. 564). Jerry Alday, the son of Ned Alday, was found in the south bedroom of the trailer home. (T. 500, 515). Jerry Alday had been shot four times in the back of the head with a .22 caliber pistol. These wounds to his head were the cause of Jerry Alday's death. (T. 560, 561).

Before Ned and Jerry Alday were murdered, Respondents learned that Jerry Alday's wife would be coming home shortly. Respondents decided to wait for her for the purpose of raping her. (T. 800-805, 922). However, before Mary Alday arrived home, Jimmy Alday arrived at the trailer on a John Deere tractor. (T. 506-507, 805). Jimmy Alday was met at the door of the trailer by Respondent Coleman. (T. 805). After being robbed, Jimmy Alday was forced to lie on the sofa in the living room where he also was shot in the head. (T. 806-807). Jimmy Alday was ultimately found with two .22 caliber bullet wounds to the back of the head, which caused his death. (T. 515, 528, 562).

Unfortunately, a short time thereafter, Mary Alday arrived at the trailer home. (T. 808). Carl Isaacs forced

her at gunpoint into the kitchen where Billy Isaacs, Coleman and Dungee were waiting. (T. 808). While Mary Alday was being robbed (T. 808-809), Aubrey Alday and Chester Alday arrived at the trailer. (T. 509-510, 809). They also were forced at gunpoint into the trailer. (T. 810).

Carl Isaacs and George Dungee forced Mary Alday into the bathroom located on the north side of the trailer home. (T. 810). Carl Isaacs returned to the kitchen, but left George Dungee in the bathroom with Mary. Coleman then took Chester Alday into the north bedroom and Carl Isaacs took Aubrey Alday into the south bedroom. (T. 810). Several shots were heard coming from the north bedroom, while clicking noises were heard coming from the south bedroom. (T. 810). Carl Isaacs then came running from the south bedroom and grabbed a .38 caliber pistol from Billy Isaacs.

Carl Isaacs returned to the bedroom where Aubrey Alday was and several shots were immediately heard. (T. 810-811). When Carl Isaacs returned to the kitchen, he was laughing and said that Aubrey had begged for mercy. (T. 811). Chester Alday, also Ned Alday's son, was found in the north bedroom of the trailer lying on the same bed where his father lay slain. (T. 501, 515). Chester Alday died as a result of a .38 caliber bullet wound to the left side of his head. (T. 570, 573).

Aubrey Alday, Ned's brother, was found in the south bedroom of the trailer home. Aubrey Alday died as the result of a head wound caused by a .38 caliber bullet being fired into the back of his head. (T. 568-570). Next, George Dungee brought Mary Alday out of the bathroom. Billy

Isaacs left the scene to transfer items to Mary Alday's automobile. Billy Isaacs returned to the trailer, he observed Mary Alday lying naked on the kitchen floor. Respondents Coleman, Carl Isaacs and George Dungee proceeded to rape Mary. (T. 812-813, 924).

The Respondents kidnapped Mary Alday. Carl Isaacs drove Mary's car, while she was forced into the back seat with George Dungee. (T. 813, 925). Respondent Coleman and Billy Isaacs followed in their car. After leaving the Alday trailer, the two cars were observed by Mr. Jerry Godby. (T. 602). Eventually, the automobiles were driven into a wooded area, where Billy Isaacs and Respondent Coleman attempted to remove fingerprints from their vehicle. (T. 815, 926).

Carl Isaacs had stopped Mary Alday's automobile a short distance from where Coleman and Billy Isaacs had abandoned their car. When they returned to Carl Isaacs' location, Isaacs started laughing and asked if anyone wanted to have sexual intercourse again with Mary Alday. (T. 816). At that point, Mary Alday was again raped by Carl Isaacs and George Dungee. Carl Isaacs attempted to force Mary Alday to perform fellatio on him, but she refused. Carl Isaacs then struck her on the side of the head with his fist and proceeded to have anal intercourse with her. (T. 816). Mary Alday was eventually forced to lie face down on the ground while still naked. She was shot twice in the head with a .22 caliber pistol by George Dungee. Dungee removed a watch from her wrist. (T. 531, 556, 567). An examination of Mary's body revealed bruises on the right side of her head, on the top of her head and over her right eye. There were also fingernail markings on

the right side of her throat and a long scratch running from her right ear almost to her chin. She suffered a bruise to her right breast. A vaginal examination revealed the presence of seminal fluid. (T. 556, 568).

The four men then traveled to Alabama in Mary Alday's automobile, where they stole an automobile license tag and eventually, as a result of a mechanical failure, were forced to steal another automobile. They attempted to wipe the fingerprints from the automobile they abandoned and discarded most of the items which they had taken since leaving Maryland. (T. 817-819).

Mary Alday's automobile was eventually discovered in Alabama. A comparison of the hood portion of her automobile with the tail light assembly of the vehicle abandoned at the same location where Mary's body was found established that the vehicles had made contact with one another. (T. 650, 729). There was testimony at trial that Carl Isaacs had used Mary Alday's car to push the other vehicle in order to start it. (T. 813-814, 925).

Fingerprints of Coleman, Carl Isaacs, Billy Isaacs and George Dungee were found and identified as follows: the fingerprints of Coleman, Carl Isaacs and Billy Isaacs were found on the automobile located near the body of Mary Alday (T. 761, 764-765); Coleman's finge prints were found on a beer can located on the table in the kitchen in the Alday trailer home (T. 766, 767); Carl Isaacs' fingerprints were found on a file cabinet in the trailer home (T. 767); George Dungee's fingerprints were lifted from a beer can found outside the trailer home on the ground (T. 768); Billy Isaacs' fingerprints were found on a camera located in the trailer home (T. 769); Carl Isaacs'

fingerprints were lifted from a road map found in the abandoned vehicle near Mary Alday's body (T. 769) and the fingerprints of Carl Isaacs and Billy Isaacs were lifted from Mary Alday's automobile which was located in Sumter County, Alabama. (T. 771, 772).

After murdering Mary Alday, the four men made their way to Alabama and eventually drove to West Virginia where they were captured. (T. 819, 696-699). A .22 caliber pistol was found at the scene of the arrest. (T. 699, 700). At the time of George Dungee's capture and arrest, he had Mary Alday's Timex watch and was in possession of a .32 caliber pistol. (T. 688-690). Within ten yards of the vehicle which was found abandoned in West Virginia, a .38 caliber automatic weapon was also found. (T. 693).

Any further facts will be referred to as is necessary for a more thorough discussion of any of the issues raised in this petition for a writ of certiorari.

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PART TWO

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE PRESUMED PREJUDICE STANDARD OF RIDEAU V. LOUISIANA, 373 U.S. 726 (1963) IS STILL VALID IN LIGHT OF THE PRESUMPTION OF CORRECTNESS SET FORTH IN 28 U.S.C. § 2254(d) AND THE SPECIAL DEFERENCE DUE STATE COURT FINDINGS OF JUROR IMPARTIALITY.

Utilizing the "rarely applied" presumed prejudice standard of *Rideau v. Louisiana*, 373 U.S. 723 (1963) the

United States Court of Appeals for the Eleventh Circuit granted federal habeas corpus relief to the Respondents, finding that pretrial publicity allegedly deprived the Respondents of fundamentally fair trials. *See Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). The circuit court arbitrarily exercised its power as a federal habeas corpus court in resorting to the presumed prejudice standard without first addressing and giving deference to the record of the voir dire proceedings of the Respondents' trials and the state courts' findings of fact as to the lack of necessity for a change of venue and the existence of juror impartiality. Petitioner submits that the presumed prejudice standard of *Rideau* has been modified by the more recent decisions of this Court stressing the presumption of correctness due state courts' findings of fact, in general, and the special deference due to findings of juror impartiality.

As already noted, in denying Respondents' direct appeals raising the issue of alleged pretrial publicity, the Supreme Court of Georgia found the jurors impanelled in those cases to be impartial. *Coleman v. State, supra* at 90-91; *Isaacs v. State,* 237 Ga. 105, 226 S.E.2d 922 (1976); *Dungee v. State,* 237 Ga. 218, 227 S.E.2d 746 (1976). The factual findings of the trial court on Respondents' consolidated motion for a change of venue and the findings of the Supreme Court of Georgia made upon reviewing the appeals of Respondents were totally ignored by the circuit court prior to embarking on a presumed prejudice analysis and were further ignored by the circuit court in applying the presumed prejudice equation. The circuit court not only gave no "special deference" to the jurors' statements of impartiality, as required by this Court's

decisions in *Patton v. Yount,* 467 U.S. —, 104 S.Ct. —, 81 L.Ed.2d 847 (1984) and *Rushen v. Spain,* — U.S. —, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983), but accorded no deference at all to the voir dire proceedings or the findings of the state courts. *Coleman v. Kemp,* 778 F.2d 1487, 1489 (11th Cir. 1985).

Affording no consideration to the absence of a demonstration of actual prejudice, or to the voir dire proceedings themselves or to the factual findings made by the trial court and the Supreme Court of Georgia, the circuit court immediately began its presumed prejudice analysis by simply reciting the limited number of cases applying the "presumed prejudice principle" and narrating the publicity given to Respondents' cases. The circuit court then simply substituted its judgment for those made by the state courts, acting as a finder of fact as to juror impartiality in the manner of a "super State Supreme Court". *See Shaw v. Boney,* 695 F.2d 528 (11th Cir. 1983).

Although the circuit court noted, "In fact, our research has uncovered only a very few additional cases in which relief was granted on the basis of presumed prejudice", the court did not hesitate in resorting to this rarely applied principle, totally ignoring any discussion of whether actual prejudice existed. *See Coleman v. Kemp, supra,* at 1490. In so doing, the circuit court ignored the clear instructions of this Court that courts of appeals exercising the narrow review of habeas corpus *must* accord factual findings of states courts a "high measure of deference" pursuant to 28 U.S.C. § 2254(d). *Sumner v. Mata,* 455 U.S. 591, 101 S.Ct. 764 (1982); *Marshall v. Lonberger,* 459 U.S. 422, 432, 103 S.Ct. 843 (1983). In short, the circuit court took upon

itself the role of the trial court and the Supreme Court of Georgia and totally disregarded the jurors' statements during the voir dire proceedings. The circuit court examined pretrial publicity in a vacuum, which examination did not include references to the voir dire proceedings themselves. Nor did the circuit court appropriately take into account the admittedly controlled courtroom atmosphere in which the three trials were conducted. *Coleman v. Kemp,* 778 F.2d 1487, 1540 n.23 (11th Cir. 1985).

The circuit court chose to utilize the presumed prejudice standard of *Rideau v. Louisiana, supra,* without addressing the correlation between the presumption of correctness due to jurors' statements as to impartiality set forth in 28 U.S.C. § 2254. Petitioner submits that the effect of the presumption of correctness and the special deference due to state court factual findings as to juror impartiality on the *Rideau* presumed prejudice principle is a matter of first impression and presents a substantial question which this Court should address. This Court noted in *Patton v. Yount, supra,* the increasing frequency with which claims are being made that prejudicial publicity has denied a federal habeas corpus petitioner a fair trial. *Patton v. Yount, supra* at 854. Therefore, this Court should address the issue of whether *Rideau* has been modified or repealed in light of the presumption of correctness.

II. ASSUMING THE CONTINUED VIABILITY OF THE PRESUMED PREJUDICE PRINCIPLE, THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHAT CONSTITUTES THE "TOTALITY OF THE CIRCUMSTANCES" TO BE REVIEWED IN A PRESUMED PREJUDICE ANALYSIS.

In applying the presumed prejudice principle, the circuit court gave passing recognition to the controlled courtroom atmosphere and the fact that the Respondents presented no evidence in their defense, when these factors, as well as the nature of the voir dire proceedings themselves and the content of the publicity, should have been examined, even assuming that a presumed prejudice analysis was appropriate. While the circuit court stated that it had reviewed the "totality of the circumstances," even a cursory review of the record shows that the true totality of the circumstances was ignored by the circuit court. *Coleman v. Kemp, supra,* at 1538.

While the circuit court made reference to the "extremely heavy burden" resting upon a petitioner to show that pretrial publicity deprived him of his right to a fair trial by an impartial jury, the circuit court found that Respondents had met their burdens solely by showing the sources and volume of pretrial publicity. Although the circuit court concluded that the record presented a "community that was deeply prejudiced as to both guilt and sentence," the court's conclusion is fatally flawed, for in reaching this conclusion the panel did not properly examine the actual totality of the circumstances. *Id.* Rather, the circuit court unduly relied on one factor, i.e., the volume of publicity concerning the crimes and the Respond-

ents. The circuit court did not properly take into consideration, under a proper totality of the circumstances review, the following illustrative factors: the overall nature of the publicity, i.e., its content; the points in time at which that publicity occurred; the fact that the majority of the newspaper coverage was straightforward and accurate; the fact that authority figures including the Sheriff and surviving members of the Alday family encouraged Seminole County citizens to allow the judicial system to deal with the crimes; that the special prosecutor and members of the prosecution team made limited statements to the press; that some of the articles established mitigating factors about Respondents; that references to the explicit testimony of Billy Isaacs were accurate and that the content of Billy Isaacs' testimony was not revealed prior to the first trial; the total lack of evidence of any mob violence or threats to Respondents; and the fact that many of the news reports concerning the crimes came not from local media, but from the Atlanta newspapers some 230 miles away.

In *Mayola v. State of Alabama*, 623 F.2d 992, 997 n.4 (5th Cir. 1980) the Fifth Circuit noted that an examination of the relevant cases utilizing the vehicle of presumed prejudice to reverse convictions reveals that:

> . . . [E]ach of these cases has either "turned on factors other than [or in addition to] pretrial publicity or [has actually] involved the Court in an examination to determine whether the trial was *in fact* unfair." (Cites omitted).

The circuit court in the instant cases even conceded that:

> The actual trial in this case was conducted by Judge Geer with decorum and dignity. Thus, there was no

> "circus atmosphere" which might have aggravated the atmosphere generated by the pretrial publicity, as in *Sheppard v. Maxwell,* 384 U.S. 333 (1966); and *Estes v. Texas,* 381 U.S. 532 (1965). To the contrary, the trial atmosphere here was a positive contribution to the totality of the circumstances.

Coleman v. Kemp, supra, at 1540 n.23.

On the basis of their superficial review of the totality of the circumstances, the circuit court found that the evidence "compelled" a finding of presumptive prejudice. In making this finding the circuit court utilized the "small town syndrome" and assumed that small, rural communities have preconceived notions as to guilt or innocence and/or sentence in widely publicized murder cases, without a recognition of the technological advances which have established a global community where news of any criminal matter can be and usually is widely disseminated.

The validity of the "small town syndrome" in presuming prejudice in light of technological advances in mass communication is a substantial question which demands this Court's attention. The prosecution in Respondents' cases is being penalized for the publicity-generating nature of the acts of the Respondents and the actions of a free press, which actions under the First Amendment, are uncontrolled and uncontrollable by the prosecution. The circuit court ignores the immediate and widespread dissemination of news to the remotest portions of the nation which is now possible and which makes even the smallest rural communities aware of newsworthy events.

Further as Circuit Judge Hill noted in his dissent from the denial of rehearing *en banc:*

> The circuit court failed to articulate a set of guiding principles to engraft upon the "rather bare bones" of *Rideau v. Louisiana, supra.*

(Appendix Volume I, document 5, pp. 217-218).

Therefore, if the presumed prejudice standard of *Rideau* is still a viable principle, the "bare bones" of *Rideau* should be fleshed out by this Court to define the totality of the circumstances which should be considered in making a presumed prejudice analysis and whether or not such principles as the "small town syndrome" are still valid in light of the state of technology in the area of mass communications. These types of policy decisions are matters which address themselves most appropriately to this Court and are squarely presented to this Court in the context of these cases. If presumed prejudice is still to be applied, this Court needs to provide guidance as to the manner in which the principle should be affected by the presumption of correctness and what factors constitute the totality of the circumstances under a presumed prejudice analysis. Such guidance is especially necessary since this Court recognized in *Patton v. Yount, supra* that the problem of pervasive publicity is one that frequently arises in sensational criminal cases. *Patton v. Yount, supra* at 854.

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CONCLUSION

Therefore, due to the changes in the case law since *Rideau* as well as the technological advances which have taken place since *Rideau,* there is a compelling necessity for guidance in reviewing claims concerning the effect

of pretrial publicity on the right to a fair trial which requires the granting of a writ of certiorari by this Court.

Respectfully submitted,

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